

STATE OF MICHIGAN  
COURT OF APPEALS

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PATRICIA DIVELY, Personal Representative of  
the Estate of MICHAEL DIVELY, Deceased,

Plaintiff-Appellant,

V

WILLIAM BEAUMONT HOSPITAL,

Defendant-Appellee.

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UNPUBLISHED  
April 18, 2006

No. 242288  
Oakland Circuit Court  
LC No. 1997-547836-NO

ON REMAND

Before: Wilder, P.J., and Neff and Cooper, JJ.

PER CURIAM.

This case is before us on remand from the Michigan Supreme Court<sup>1</sup> for reconsideration in light of defendant's material misrepresentation to this Court and the Supreme Court's decisions in *Gilbert v DaimlerChrysler*, 470 Mich 749; 685 NW2d 291 (2004) and *Craig v Oakwood Hospital*, 471 Mich 67; 685 NW2d 296 (2004). Upon review, we conclude the trial court abused its discretion by failing to strike defendant's expert witness and we remand for a new trial.

We previously outlined the facts of this case in our earlier opinion<sup>2</sup> and provide a synopsis here. Plaintiff's decedent was injured while receiving physical therapy for knee surgery. As Dively was performing an exercise on "the Total Gym," the apparatus failed, totally disabling decedent. Plaintiff brought a products liability action against the company that sold the equipment and a premises liability action against defendant. The products liability case was settled. The premises liability action proceeded to trial but ended in a mistrial ("first trial"). Dively died after the first trial and before the second trial of this matter, which resulted in a jury verdict finding that defendant was not negligent. Plaintiff appealed to this Court, asserting the

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<sup>1</sup> *Dively v William Beaumont Hospital*, 472 Mich 906; 696 NW2d 709 (2005).

<sup>2</sup> *Dively v William Beaumont Hospital*, unpublished per curiam opinion of the Michigan Court of Appeals, issued June 22, 2004 (Docket No. 242288).

trial court abused its discretion by allowing defendant, despite continued discovery violations, to call James Lighthall as its expert liability witness. Based on both trial counsel's and appellate counsel's representations<sup>3</sup> that Lighthall had been identified as a witness more than a year before trial during voir dire in the first trial, and that plaintiff had failed to object to his identification at that time, a majority of this Court concluded that, although defendant ignored its obligation to supplement its discovery responses, the trial court did not abuse its discretion in allowing Lighthall to testify given the record available at the time.<sup>4</sup> Plaintiff appealed to the Supreme Court and the Supreme Court, upon reviewing the entire voir dire transcript, vacated the decision of this Court and remanded for reconsideration. In doing so, the Court directed, in relevant part:

Pursuant to MCR 7.316(A)(4), we [direct] the Court of Appeals to reconsider its decision in light of the transcript establishing that Lighthall was in fact not among the witnesses identified during voir dire. We further [direct] that the Court of Appeals reconsider the admissibility of Lighthall's testimony under MRE 702 in light of our decisions in [*Gilbert, supra*] and [*Craig, supra*]. [*Dively, supra* at 906.]

Accordingly, we review the trial court's decision to allow Lighthall to testify for an abuse of discretion. *Carmack v Macomb Co Comm College*, 199 Mich App 544, 546; 502 NW2d 746 (1993). The qualification of a witness as an expert and the admissibility of the expert's testimony are also within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *Tobin v Providence Hosp*, 244 Mich App 626, 654; 624 NW2d 548 (2001).

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<sup>3</sup> The record shows that appellee's trial counsel, in opposing plaintiff's motion to strike Lighthall as an expert witness, made the following representation to the trial court:

Back in November of 2000[,] Mr. Lighthall was identified as a witness in the case. We picked a jury in that case, as your Honor well remembers, and in the identification of witnesses to that jury and that aborted trial that had a mistrial, Mr. Lighthall was identified. [Jury Trial Transcript, dated May 16, 2002, p 45.]

Appellee's appellate counsel, while acknowledging the voir dire proceedings from the first trial had not been transcribed, made the following representation to this Court in appellee's brief on appeal:

Dr. Lighthall's name was again repeated to the jury during *voir dire* (Plaintiff did not order the transcription of the *voir dire* proceedings for this appeal). [Defendant Appellee's Brief on Appeal, p 14 (*italics in original*).]

<sup>4</sup> In her original appeal, plaintiff attached two transcript pages of the voir dire proceedings to her appellant brief. Following oral arguments, plaintiff submitted a request for the voir dire proceedings in its entirety. The court reporter completed the voir dire transcript after this Court issued its June 22, 2004 decision.

A new trial is warranted in this case, given defendant's conduct in failing to disclose Lighthall's identity, qualifications and his report and opinions for eighteen months between the mistrial and the second trial. MCR 2.302(E). Witness lists are an element of discovery, designed to avoid "trial by surprise." *Grubor Enterprises v Kortidis*, 201 Mich App 625, 628: 506 NW2d 614 (1993). A court may exclude evidence as a sanction for failing to provide discovery, and this Court has upheld the exclusion of evidence for failure to provide discovery. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 605; 568 NW2d 93 (1997).

In this case, defendant's conduct clearly prejudiced plaintiff. Defendant initially identified Lighthall as a rebuttal witness on the final pretrial witness list and did not disclose Lighthall as an expert witness until the filing of an amended witness list, without the court's permission, one month prior to the second trial. Defendant failed to disclose its intent to call Lighthall until the fourth day of trial and withheld Lighthall's report, minus his opinions, until well into trial. Trial counsel's continuous course of conduct prevented plaintiff from conducting discovery concerning Lighthall's qualifications and intended testimony. Additionally, and equally as important, trial counsel falsely informed the trial court that Lighthall had been identified as an expert witness during voir dire of the first trial. Given this material misrepresentation by trial counsel, plaintiff was under no obligation to have objected to Lighthall's case in chief testimony in advance of the second trial. Accordingly, the trial court abused its discretion by failing to exclude Lighthall's testimony as an appropriate sanction given defendant's failure to provide discovery pertaining to Lighthall's identity, qualifications and proposed testimony. *Local Area Watch v City of Grand Rapids*, 262 Mich App 136, 147; 683 NW2d 745 (2004); *Setterington, supra* at 605.

We also find, pursuant to *Gilbert, supra* and *Craig, supra*, that the trial court abused its discretion by permitting Lighthall to testify beyond the scope of his expertise. Under MRE 702, the trial court had an independent obligation to review all expert opinion testimony in order to ensure that the opinion testimony . . . was rendered by a "qualified expert," that the testimony would "assist the trier of fact," and . . . that the opinion testimony was rooted in "recognized" scientific or technical principles. *Craig, supra* at 82.

Here, Lighthall was only qualified to offer limited expert testimony. Lighthall held a bachelor's degree in biology and a Ph.D. in anatomy and neuroscience. Lighthall testified his expertise was in the field of biomechanics, which involves the direct application of the laws of physics to living structures and analyzes the interaction between machinery and people. However, the trial court allowed Lighthall to testify concerning the structure of the machine, the snaphook and keeper assembly, and the likelihood of machine failure if the hook was in an improper position. This testimony concerned the machine's engineering deficiencies, and not biomechanics. An expert who lacks "knowledge" in the field at issue cannot "assist the trier of fact." *Gilbert, supra* at 789. Because Lighthall did not have an engineering degree and stated he would not be offering engineering opinions, the trial court abused its discretion in determining that Lighthall was sufficiently qualified to give the testimony in question.

We vacate the judgment for no cause of action entered in favor of defendant and remand for a new trial. On remand, as a consequence of defendant's discovery violation and subsequent

misleading of the trial court, the trial court shall enter an order striking Lighthall as a witness in the new trial. We further direct the Clerk of Court to refer this case to the Attorney Grievance Commission for possible investigation. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Janet T. Neff

/s/ Jessica R. Cooper